Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Promoting Diversification of Ownership In the Broadcasting Services	MB Docket No. 09-182 MB Docket No. 07-294

COMMENTS OF MEDIA ACCESS PROJECT AND PROMETHEUS RADIO PROJECT

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Media Access Project and Prometheus Radio Project (jointly "Prometheus") applaud the Commission for acknowledging that restrictions on newspaper/broadcast combinations continue to be necessary to promote viewpoint diversity within local markets. Notice of Proposed Rulemaking, In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, FCC 11-186 (rel. Dec. 22, 2010) ("NPRM") at ¶95. Prometheus is heartened by the Commission's acknowledgment that the Internet only has confirmed the need for diversity in local news, given that the Web sites most frequently viewed for news and information are affiliated with legacy media. *See id*.

Notwithstanding the foregoing, that the Commission is even asking for comment on the irreparably flawed (not to mention harmful to the public's interests) waiver criteria proposed in the *2008 Order*[1] is disturbing, to say the least. The proposed waiver criteria – then and now – would completely undermine the media ownership rules by creating exceptions that swallowed the rule. With this in mind, Prometheus submits this response specifically to the Commission's request for comments on the list of four factors introduced in the 2006 rule for analyzing whether a specific newspaper/broadcast ownership combination was in the public interest. *Id*. at ¶114. Moreover, Prometheus believes the Commission must redouble its efforts to provide the public with sufficient

[1] 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order, 23 FCCRcd 2010 (2008) ("*2008 Order*").

notice of license renewals, transfers and assignments[2] involving waivers, and accordingly proposes certain changes to that end. If the Commission continues to deny the public sufficient notice of license renewals and transfers, any and all measures taken in the context of this proceeding to secure the public's interest will be insufficient. Finally, Prometheus supports the comments filed by Free Press and UCC, *et al*. regarding additional measures.

The *2008 Order* would have revised the rule to evaluate potential newspaper/broadcast cross-ownership proposals on a case-by-case basis using reversible presumptions. Proposed combinations in a top 20 Nielsen Designated Market Area ("DMA") were presumed to be in the public interest as long as the television station in question was not ranked among the top four stations in the market and eight independent "major media voices" remained in the market after the combination. In areas outside of the top 20 DMAs, combinations would be presumed not in the public interest. This negative presumption, however, all too easily would have been overcome by any applicant willing to make ambiguous promises about "increasing independent news sources in the relevant market" or saving a "failed/failing" entity. *Id*. at ¶115.

In this NPRM, the Commission acknowledges these elements of the *2008 Order* "may not be necessary to promote the public interest," but seeks comment nevertheless on "whether to retain some or all of the factors the Commission adopted under the 2006 rule to consider in cross-ownership transactions." *See id*. at ¶91. Prometheus believes that the Commission should not adopt the four-factor test in any manner, because it is vague and provides no means for enforcement. But in any event, as the Commission

[2] For purposes of these comments, the term "transfer" hereinafter will refer to both transfer and assignment.

acknowledges, the factors in their present form are unnecessary "given that filing a waiver petition is always an option…." NPRM at ¶115. Were the Commission to adopt such vague criteria for waivers, it would only complicate the process for applicants - applicants would lack any certainty about their chances for approval on a cross-ownership proposal - and members of the public, who would lack any means to determine their likelihood for success in challenging a proposed acquisition.

Finally, the Commission must provide the public with adequate notice of proposed combinations necessitating waivers. As discussed more fully below, the Commission's current notice mechanism does not even reach the public, much less promote public participation in the broadcast licensing process.

The Commission Should Not Adopt Any Factors Proposed Under the 2006 Rule.

The Commission wisely opted not to propose adoption of the four factors, the "local news" or "failed/failing station" tests. The Commission should not adopt a four-factor test or any waiver criteria. The *2008 Order*'s waiver tests were - and remain - hopelessly flawed. It remains unnecessary to adopt any factors facilitating waivers, much less factors like the *2008 Order*'s, which would have facilitated nearly every waiver notwithstanding the public's interest in media competition, diversity and localism.

Ostensibly the four-factor test would have required applicants to make showings regarding (1) the amount of local news that would be produced post-transaction; (2) the extent to which the affected media outlets would exercise independent news judgment; (3) the level of concentration in the DMA; and (4) the financial condition of the applicant, and if financially distressed, the applicant's commitment to invest in newsroom

operations. But in practice the "test" could be passed by any applicant.[3] The Commission would have allowed for any applicant that promised, for example, to "increase local news" or "exercise independent news judgment," to obtain its waiver and never meet either promise, without any repercussions until theoretically 8 years later at license renewal time. Even if revocation were not, at best, a theoretical remedy,[4] absent a detailed burden of proof standard against which applicants could have been judged, those that abused the criteria's vagueness easily could make their case for compliance. An applicant that obtained its waiver by promising to "increase local news," for example, could have pointed out its promise did not necessarily constitute a promise to increase local news for any length of time, much less 8 years. The Commission neither specified how local news would be measured nor how much local news production must increase to justify waiver, nor otherwise indicate that anything beyond a promise to increase was necessary to satisfy this "test."[5] Finally, the Commission did not indicate how the

[3] *See* Comments on Chairman Martin's Proposal by Office of Communication of the United Church of Christ, Inc. ("UCC"), et al. (filed Dec. 11, 2007) (highlighting the various shortcomings of the four-factor test, criticizing the vagueness of the factors and asking the FCC to explain how they would be used and provide mechanisms for enforcement). The 2008 Order disputed the test's vagueness without revealing how the factors together would be applied. *See 2008 Order*, at n.221.

[4] The standard for assessing renewals (as modified in the 1996 Communications Act) does not permit denial based on non-compliance with a Commission order. 47 USC §309(k)(1) (basing non-renewal only upon "serious violations" or a "pattern of abuse" of the Communications Act "or the rules and regulations of the Commission."). Moreover, the burden of proof in such cases is so high that the Commission has only rarely sought to invoke this power except when it is essentially uncontested. It is generally employed only when stations "go dark," or when a licensee is convicted of a serious crime. *See, e.g., Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000).

[5] Should the Commission consider any waiver factor regarding "local news," notwithstanding the fact it is unnecessary and not otherwise in the public's interest, Prometheus endorses the test proposed by the Public Interest Public Airwaves Coalition ("PIPAC") with respect to broadcast disclosures, which was intended to prevent stations from claiming a story simply identifying the winner of American Idol is "local news" anywhere outside the hometown of that winner. *See* Letter from the Public Interest

different factors would be weighed. It remained unclear, for example, whether the Commission would have applied the four-factor test to grant waivers to those that committed to air a significant amount of additional news but not to maintain independent news judgment within the affected media outlets.

The closest the Commission came to specificity when proposing the showings required for applicants to overcome the NBCO rule's stated presumptions was to propose reversal of the negative presumption "when the proposed combination was with a broadcast station that was not offering local newscasts prior to the combination, and the station would initiate at least seven hours per week of local news after the combination." *2008 Order* at ¶67. Licensees that made this showing had to "report to the Commission annually regarding how they followed through on their commitment." *Id*. But here too the Commission provided no detail about the annual reporting process or the repercussions in the event a broadcaster's annual report (or even several annual reports in a row, for that matter) indicated failure to follow through on its commitment.

Finally, the *2008 Order* proposed both a waiver for failed/failing stations and, inexplicably, a separate "financial distress" factor as part of the four-factor test. This factor imposed a lower hurdle than the failed/failing station criteria, for applicants to cross to the same end. While the financial condition factor, like the rest of the four-factor test, was unnecessary and irreparably vague, the existence of the failed/failing station model rendered the "financial distress" factor even more irreparably flawed. It is arbitrary and capricious to pose one hurdle – the "failed/failing station model" – and

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Public Airwaves Coalition to Chairman Genachowski re: MM Docket No. 00-168 and GN Docket No. 10-25, Aug. 14, 2011, n. 23. Using PIPAC's recommended definition, "local news programming" under the local news test would mean "programming that is locally produced and reports on issues about, or pertaining to, a licensee's local community of license." *Id*.

thereafter pose before the very applicants that failed to cross that hurdle a second, lower hurdle – "financial distress" – to the same end. The only other possibility was that the Commission would treat the two tests as equivalent, such that applicants that had not meet the standard for the failed or failing station waiver had not made a showing of "financial distress" sufficient to obtain a waiver. But this only would render the two tests redundant.

The Commission Should Provide Sufficient Public Notice of Proposed Requests for Waivers.

The entire waiver scheme is fundamentally flawed because it fails to provide opportunity for public participation, thereby leaving the Commission to make decisions based solely on the self-serving statements of applicants. In theory, the current FCC rules require that both the licensee and the Commission give public notice of proposed transfers. 47 CFR §73.3580 (2007). The public notice is intended to "ensure that listeners and viewers will have a meaningful opportunity to participate in the license assignment process." *Id*. at (f).

In practice, current rules do not provide meaningful public notice. Nearly a decade ago, the Commission acknowledged its notices may not be adequate to "promote public participation in the broadcast licensing process," as "the required public notice does not advise the public of the opportunity to file comments, petitions to deny, or informal objections or the deadlines that apply to these filings." Revision of the Public Notice Requirements of Section 73.3580, Notice of Proposed Rulemaking, 20 FCCRcd 5420, 5420-21 (2005). Nevertheless, the Commission's admission has yet to result in measures that restore "meaningful opportunity" for listeners and viewers "to participate…." *Id*. The Commission's inaction daily has harmed the public's interest, and flown in the face of the Commission's Congressional mandate. Prometheus therefore

urges that the Commission adopt in this proceeding measures providing sufficient public notice of proposed transfers.

It is arbitrary and capricious for the Commission to rely on public participation while simultaneously depriving members of the public of information necessary to exercise their right under Section 309 to object to the renewal on application for renewal or transfer of a broadcast license on the ground that it would not serve the public interest. *See UCC v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The right of members of the public to challenge broadcast license applications that would not be in the public interest has the same statutory basis as that which the D.C. Circuit interpreted in *UCC v. FCC* – the Communications Act, 47 U.S.C. §§309, 310.

In *UCC v. FCC*, the Court stated:

> This proposed renewal scheme would place near-total reliance on petitions to deny as the means to identify licensees that are not fulfilling their public interest obligations. That the Commission would simultaneously seek to deprive interested parties and itself of the vital information needed to establish a prima facie case in such petitions seems almost beyond belief.

Id. at 1441-42. Underscoring the need for interested parties to have sufficient notice to establish a case against extending a given license, the Court further held that "if the Commission should alter a policy and yet fail to recognize the change or fail to provide either adequate explanation or adequate consideration of the relevant factors and alternatives, ***we must set aside the Commission's action*** and remand for further proceedings." *Id*. at 1426 (emphasis added).

For parties to have sufficient information even to determine their interest, a notice announcement must actually reach the public. This means, for one, that any notice of renewal or transfer involving a waiver must be made via outlets that actually reach the

public. Thus the Commission should require that frequent and prominent notice be given in the affected newspaper and on the affected broadcast station to ensure that the public learns of proposed mergers. Related, the Commission also should increase the frequency with which applicants for renewal or transfer must broadcast notice, to at least once a week, if it is to ensure that viewers and listeners have a meaningful opportunity to participate, rather than an opportunity that fleets as quickly as expletives.

Even if more frequently and broadly presented, a notice announcement will not adequately promote public participation unless listeners and viewers receive appropriate information in a clear and understandable manner. To be sufficiently specific, the notice language ought to include (1) whether the proposed buyer is a local entity, (2) whether a non-local entity is seeking to buy a broadcast station,[6] (3) a list of other media outlets that the proposed buyer already owns,[7] and (4) whether the proposed buyer is applying

[6] The Commission long ago recognized its "overarching goal of establishing and maintaining a system of local broadcasting that is responsive to the unique interests and needs of individual communities." *See, e.g.*, Broadcast Localism, Notice of Inquiry, 19 FCCRcd 12425, ¶4 (2004) ("Broadcast Localism"). In aid of establishing the impact of media consolidation on localism in radio broadcasting, the Commission spearheaded an initiative, including a "Localism Task Force." *See* http://www.fcc.gov/localism/. *See also* Broadcast Localism, 19 FCC Rcd. at 12427 ¶¶5, 6, 12447, Statement of Commissioner Michael J. Copps (approving in part, dissenting in part) ("During the hearings and forums on media ownership that Commissioner Adelstein and I attended across the country, we heard time and again from citizens about the detrimental impact that consolidation has already had on localism and diversity and we heard their fears about where still more concentration will lead."). Moreover, in this very NPRM, the Commission took the opportunity to reaffirm its "commitment to promote localism through media ownership rules," and its intent that those rules "respond to the unique concerns and interests of the audiences within the stations' respective service areas." NPRM at ¶14.

[7] In this NPRM, the Commission reaffirmed its "belief that the media ownership limits are necessary to preserve and promote viewpoint diversity," as well as its "conclusion that viewpoint diversity is generally promoted by competition among independently owned media outlets." NPRM at ¶17. Earlier, the Commission recognized that media concentration affects viewpoint diversity, noting that "outlet ownership can be presumed to affect the viewpoints expressed on that outlet." 2002 Biennial Regulatory Review,

for a waiver of the Commission's ownership rules, and on what grounds. Moreover, to promote effective public participation, such a notice should begin immediately upon the application's filing, specify that the public has a right to comment and object, explain how the public can acquire information about how to exercise that right, and include the date on which comments and petitions to deny are due, once that date is established.[8]

The ownership rules are intended to serve the public interest. Thus, it is particularly important that the public know when an application seeks a waiver of those rules. Nearly two decades ago, the Commission acknowledged that it is important to "develop the fullest record possible" in waiver proceedings.[9] In this NPRM, the Commission based its conclusion that a case-by-case approach to waiver applications would best serve viewpoint diversity, in part, on the fact that it would best provide opportunity for "opponents to a waiver request, even in the largest markets, [to] maintain the ability to argue that specific circumstances overcome a favorable presumption," and ensure that applicants in smaller markets "are not precluded from demonstrating the benefits of that particular combination in the individual market." NPRM at ¶103. Yet without sufficient and meaningful public notices, opponents to a waiver request have no ability to argue against it or access sufficient information to understand the local benefits of any particular combination.

Report & Order and Notice of Proposed Rulemaking, 18 FCCRcd 13620, ¶27. On appeal, the Third Circuit affirmed this finding, noting that "ample evidence supported [the Commission's] conclusion that ownership can influence viewpoint." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 401 (3d Cir. 2004).

[8] Before that date is established, the notice can omit it. The lag in time between an application's filing and the Commission's setting of the relevant dates only underscores the need for more frequent public notice broadcasts.

[9] *Fox Television Stations, Inc.*, 8 FCCRcd 5341, ¶1 (1993).

To promote public participation, the Commission's public notices of applications for license renewal or transfer must specify when applications include a request for permanent waiver. Section 73.3580, which specifies the wording that applicants must use in on-air announcements alerting members of their service areas that the station has filed an application with the FCC and that the public has the right to object, says nothing about whether the applicant is seeking a waiver of the FCC rules. *See* 47 CFR §73.3580(d)(4)(text of announcement); *id*. at §73.3580(f)(similar). And applicants do not *sua sponte* inform the public that they are seeking a waiver. Therefore, the public only can be informed if the Commission requires that public notices contain this information.

The Commission cannot give meaningful notice to viewers and listeners served by an implicated station simply by "flagging" applications with waiver requests.[10] As the Commission has acknowledged, "the relatively few on-air announcements currently required" do not inform the public about license renewal or transfer proceedings, and "many in the public do not understand the Commission's license renewal process, or, more particularly, that the procedure affords listeners and viewers a meaningful opportunity to provide their input."[11] Even broadcast lawyers do not review the FCC's daily public notices with the kind of fine-toothed comb that would catch these type "public notices" of waivers. The remaining millions of Americans cannot reasonably be expected to review these lengthy public notices every day in case a station in their communities might be seeking a waiver.

[10] A proposal that it would "flag" applications for a proposed transfer or renewal requiring a waiver is all the Commission earlier offered in response to stated concerns regarding the insufficiency of its public notices. *2008 Order* at ¶79.
[11] Report on Broadcast Localism, MB Dkt. 04-133, ¶23 (rel. Jan. 24, 2008).

Respectfully submitted,

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